WONG MUN WAI v. WONG THAM FATT & ANOR.

[O.C.J. (L.C. Vohrah J.) October 30, 1986]
[Kuala Lumpur – Civil Suit No. F.256 of 1981]

Agency Law – Power of attorney – Sale and transfer of half share of land belonging to principal pursuant to power of attorney – Sale below market value – Subsequent sale to agent's wife – Collusion of defendants – Claim by principal for accounts of profits and damages – Breach of undertaking – Fraud, conspiracy and misrepresentation – Standard of proof – Duty of agent – Limitation – Amount payable to plaintiff – Interest and costs – Limitation Act, 1953, ss. 9 & 22.

The plaintiff is the elder brother of the first defendant, who is the husband of the second defendant. The dispute arose out of the sale of land carried out by the first defendant pursuant to a power of attorney given by the plaintiff, who now claims against the defendants for an account of profits arising from the sale alleged to be improper, for payment of half of these profits, and for general damages arising from alleged breach of undertaking, fraud, conspiracy and misrepresentation.

The land measuring over 22 acres held under C.T. 8040 for Lot 372, Mukim of Sungei Buloh, Kuala Lumpur, was in 1954 transferred in equal undivided shares to the plaintiff and the first defendant for the stated consideration of $5,000. Before the plaintiff left Malaya for Hong Kong in 1962, he executed the power of attorney and later in 1966 an authorization-cum-undertaking in favour of the first defendant. On April 20, 1968, the first defendant, as attorney of the plaintiff, transferred to his business partner one Lau Chong Yin (P.W.5) the plaintiff's half share in the said land for the stated consideration of $3,000. On May 3, 1968, P.W.5 transferred the said half share to the first defendant's wife (*i.e.* second defendant) for the stated consideration of $3,500. The defendants sold the said land to S.E.A. Housing Corporation Sdn. Bhd. ("S.E.A.") for a consideration of $962,062.50 and the transfer was registered on May 30, 1979.

The main thrust of the plaintiff's case is that the first defendant as agent and trustee of the plaintiff conspired with the second defendant to defraud the plaintiff by causing the sale of the said half-share to P.W.5 in 1968 and its almost immediate re-purchase by the second defendant without the plaintiff's authority, consent or knowledge and that all along until the said land was finally sold to S.E.A. in 1979 for the huge sum of $962,062.50 the plaintiff had been misled into believing that he was still the half-owner of the said land. In a nutshell, the plaintiff's case is that through the collusion of the defendants the plaintiff was deprived of the said half-share in 1968 and was misled into believing that he was still the owner of the said half-share until 1979.

The defendants make a complete denial of all the allegations of fraud and aver that the plaintiff actually knew of the sale of the said half-share to P.W.4 and its subsequent purchase by the second defendant and that the plaintiff's plea of ignorance of these sales was really due to his desire to take advantage of the escalation in price of the said property when it was finally sold to S.E.A. at a time when he had no more interest in the said land so that he is estopped by virtue of his knowledge from making his claim and is also barred by limitation as the alienation of the said half-share took place in 1968.

Held: (1) there can be no question that in this particular case the first defendant had a duty to act in good faith in protecting the interests of the plaintiff with regard to the said half-share and could not use his position as agent to profit at the plaintiff's expense;

(2) when the first defendant caused the said half-share to be transferred out of the plaintiff's ownership he did not do so with fraudulent intent as he was legally empowered to do so not only by the power of attorney but specifically by the authorisation-cum-undertaking. However, his conduct was far from honourable and fell far short of that required of an agent although it was obviously, to a very large extent, the result of his pre-occupation with the plaintiff's indigence and consequent financial dependence upon him;

(3) with regard to the standard of proof, the plaintiff has failed to discharge the burden of proof required of him to establish that the first and second defendants had by misrepresentation and/or fraud caused the said half-share to be transferred to the second defendant. In view of the court's finding that the first defendant was the agent of and owed fiduciary duties to the plaintiff, the first defendant has certainly failed in his duty as agent of the plaintiff in selling the said half-share well below the market value and also in not informing the plaintiff that he had sold it at $3,500 in 1968 to the second defendant below its market value so as to afford the plaintiff the opportunity of questioning the price;

(4) the plaintiff's action is not barred by section 9 or section 22 of the Limitation Act, 1953;

(5) the first defendant must pay the plaintiff the sum of $240,500.00 with interest to run thereon from June 1, 1979, at the rate of 8% p.a. until date of judgment, and with costs to the plaintiff against the first defendant.

Case referred to:

(1) *Lau Hee Teah* v. *Hargill Engineering Sdn. Bhd. & Anor.* [1980] 1 M.L.J. 145.

CIVIL SUIT.

P.S. Ranjan (*Miss B. Loo* with him) for the plaintiff.

T. Selvarasan (*Chandran Nair* with him) for the defendants.

Cur. Adv. Vult.

L.C. Vohrah J.: The plaintiff's claim is for an account of profits arising from the sale of land alleged to be improper, for payment of half of these profits, and for general damages arising from alleged breach of undertaking, fraud, conspiracy and misrepresentation.

The facts which are agreed upon are as follows. The plaintiff is the elder brother of the first defen-

dant who is the husband of the second defendant. The plaintiff and the first defendant have only one sister, Wong Yock Oi (D.W.2), a spinster. Their late father became the registered owner of the whole of the land comprised in and held under Certificate of Title 8040 for Lot No. 372, Mukim of Sungei Buloh, Kuala Lumpur, and measuring over 22 acres ("the said land") on November 5, 1928 and on May 23, 1938, conveyed the said land to his wife Wong Cheow Yin, now deceased, who on December 14, 1954, transferred the said land in equal undivided shares to the plaintiff and the first defendant for the stated consideration of $5,000/—. Some time in the latter part of 1962 the plaintiff left Malaya for Hong Kong to reside there permanently. Before he left he executed on August 9, 1962 a power of attorney AB.2-4 in favour of the first defendant authorising him to do all or any of the things specifically provided therein ("the power of attorney") and by Clause 9 the first defendant was authorised to sell to any person all or any of his lands and for that purpose to sign and execute all transfers and other instruments necessary. On May 4, 1966, the plaintiff signed another document AB. 17 ("the authorisation-cum-undertaking") which reads:

"This is to certify that the accounts submitted to me by my agent Wong Tham Fatt are true and correct. I do authorise my agent the said Wong Tham Fatt to sell any of my remaining estates in Malaysia at any price as he thinks fit and proper in order to settle my debts of whatsoever kinds. I do further confirm that I and my family are being settled down in the Colony of Hong Kong at our own wills and do agree to stay peacefully and harmoniously with my mother who stays with me at the same premises.

Signed: Wong Mum Wai alias Wong Ngen Chiam.

Witness by:
Signed: Fong Ah Kow."

On April 20, 1968 the first defendant in his capacity as the attorney of the plaintiff transferred to a business partner of his, one Lau Chong Yin also known as Liew Choon Koon (P.W.5), the plaintiff's half-share in the said land ("the said half-share"). The consideration stated in the instrument of transfer SAB. 66-70 was the sum of $3,000/—. P.W.5 was then and has continued to be either an employee or a partner of the first defendant in the pawnshop known as Koon Sang Pawnshop at No. 460 Pudu Road, Kuala Lumpur ("the pawnshop"). Shortly afterwards on May 3, 1968, P.W.5 transferred the said half-share to the first defendant's wife for the consideration stated in the instrument SAB. 71-74 as $3,500/—. The plaintiff through his solicitors in Hong Kong by letter dated December 5, 1974, AB. 64, revoked the said power of attorney, some twelve years after its execution. The defendants sold the said land to S.E.A. Housing Corporation Sdn. Bhd. ("S.E.A.") for a consideration of $962,062.50 and the transfer was registered on May 30, 1979.

As made out from the pleadings, the main thrust of the plaintiff's case is that the first defendant as agent and trustee of the plaintiff conspired with the second defendant to defraud the plaintiff by causing the sale of the said half-share to P.W.5 in 1968 and its almost immediate repurchase by the second defendant without the plaintiff's authority, consent or knowledge and that all along until the said land was finally sold to S.E.A. in 1979 for the huge sum of $962,062.50 the plaintiff had been misled into believing that he was still the half-owner of the said land. The two statements of defence in brief make a complete denial of all the allegations of fraud and aver that the plaintiff actually knew of the sale of the said half-share to P.W.4 and its subsequent purchase by the second defendant and that the plaintiff's plea of ignorance of these sales was really due to his desire to take advantage of the escalation in price of the said property when it was finally sold to S.E.A. at a time when he had no more interest in the said land so that he is estopped by virtue of his knowledge from making his claim and is also barred by limitation as the alienation of the said half-share took place in 1968.

As the basis of the plaintiff's action is fraudulent conduct on the part of the defendants in divesting the plaintiff of the said half-share, it is necessary before considering the evidence in detail to bear in mind the standard of proof required of the plaintiff as laid down by the Federal Court in *Lau Hee Teah* v. *Hargill Engineering Sdn. Bhd. & Anor.*[1] Therein Abdoolcader J. (as he then was) at page 150 stated:

"On the question of the burden of proof when fraud is alleged, the standard required in civil cases is proof on the balance of probabilities *but the degree of probability which must be established will vary from case to case according to the gravity of the allegation to be proved.* A civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. *It does not adopt so high a degree as a criminal court but still it does require a degree of probability which is commensurate* with the occasion *(Bater* v. *Barter* [1951] P. 35, 37, *Hornal* v. *Neuberger Products Ltd.* [1957] 1 Q.B. 247, 263-264, 266).

(Emphasis provided).

In other words, in considering the evidence I have to be regardful of the fact that the plaintiff has to discharge a higher degree of proof than that required in the normal run of civil cases with regard specifically to the allegation or imputation of fraudulent conduct on the part of the defendants and what this higher degree of probability is will depend upon the special circumstances of this case.

On the basis of the agreed facts Counsel representing the parties submitted five issues for consideration with a rider from Counsel for the plaintiff to the effect that he had other issues which could not be agreed upon. The five agreed issues are:

(1) Whether the first defendant was agent and trustee for the plaintiff in respect of the said half-share;

(2) Whether there was a fiduciary relationship between the plaintiff and the first defendant;

(3) Whether the first and second defendants had by misrepresentation and/or fraud caused the said half-share to be transferred to the second defendant;

(4) Whether the plaintiff is estopped and precluded by his conduct from making his claims; and

(5) Whether the action is barred by limitation.

The evidence in this case has been unusually voluminous because of the necessity to narrate events over a period of nearly two decades from 1962 to 1979, and because the main witnesses have had to go through more than twenty letters in the agreed bundle written during that period, letters upon which both sides rely for the inferences to be drawn in support of their respective cases. I shall for brevity and convenience, when dealing with these letters summarise their contents by just highlighting their main purpose. I shall, however, have to consider the evidence in some detail in order to determine the truth or otherwise of the allegations that have been made.

The plaintiff who is sixty-eight years old and an economics graduate of a Cantonese-medium university in Canton with the ability to understand and read English gave his evidence as follows. He left the country for Hong Kong in 1962 under a family arrangement whereby he was to redevelop the mother's properties there consisting of three four-storeyed buildings comprising flats and the first defendant was to manage the plaintiff's business affairs and properties in Malaya for which purpose he executed the power of attorney. At that time he owned a shop-house in Raub ("the Raub property"), the said half-share and a one-third interest in a photographer's shop called "Sang Wood" in Batu Road, Kuala Lumpur. Before he left to take up residence in Hong Kong he was the manager of the pawnshop of which the first defendant was a partner. After settling down in Hong Kong he received a letter dated May 4 1964 (AB. 10) from the first defendant intimating that the Raub property was being sold for the price of $23,500/- and enquiring how the proceeds of the sale minus brokerage fees were to be utilized. He had agreed to the Raub property being sold in order that the first defendant would have funds to remit a monthly maintenance allowance of A£40 to his elder son Sig Mun who was then studying in Australia. Shortly afterwards he received another letter dated May 13, 1964. (AB. 12), from the first defendant informing the plaintiff that the balance of the purchase price of the Raub property after payment of the brokerage fee and back assessment was $22,945/- and again enquiring how this sum was to be used. Then about two years later he received the A.R. registered letter dated March 11, 1966 (AB. 13), together with a statement of account for the period from August 26, 1962, to February 28, 1966 (AB. 14-16), indicating to the plaintiff that he had only a credit balance of $1,068.98, an amount which was only sufficient to cover remittances to Sig Mun for the three months of March, April and May of 1966. In this letter the first defendant asked for instructions with regard to the "further maintenance" of Sig Mun. The first defendant then turned up in Hong Kong a short while later and on May 4, 1966, obtained the plaintiff's signature on the authorisation-cum-undertaking in the presence of a mutual friend Fong Ah Kow (D.W.4). He signed it fully understanding its contents relating to the correctness of AB. 14-16, to the specific authorisation to the first defendant to sell any of his remaining estates in Malaysia at any price the first defendant thought fit for the purpose of settling his debts, to the declaration that he and his family were settling down in Hong Kong of their own free will, and to the assurance that he would live in peace and harmony with the mother who was then staying in the same household. The reason for his signing the authorisation-cum-undertaking was to ensure that the first defendant continued remitting the monthly maintenance allowances to Sig Mun and to allay the first defendant's concern over the quarrels his

wife was having with the mother. He never received any accounts from the first defendant with regard to his interest in Sang Wood. He also never received the first defendant's letter dated September 15, 1967 (AB. 21), submitting the statement of account for the period from March 1, 1966 to June 30, 1967 (AB. 22), showing a credit balance of $7,085.25. The next letter he received from the first defendant was that dated September 19, 1967 (AB. 24), wherein the first defendant complained about financial indigence in reply to his letter dated September 7, 1967 (AB. 18), asking the first defendant to remit £70 to Sig Mun (who had by then moved to England) for medical expenses. He also did not receive the first defendant's letter dated July 2, 1968 (AB. 27), forwarding a statement of account for the period from March 1, 1966, to June 10, 1968 (AB. 28), showing, *inter alia*, the sale of the said half-share for $3,000/– on April 20, 1968, and a debit balance of $3,006.27 as at June 30, 1968, and also enquiring as to when and how he intended to repay this outstanding sum owing to the first defendant. Then some four and a half years later he wrote the letter dated February 20, 1973 (AB. 31), at a time when relations between his wife and the mother were "rather strained," suggesting in a tone of some urgency that the mother give him part of the proceeds of the sale by her of a block of flats so that he could buy a flat of his own for him and his family to move into. About a year later he wrote the letter dated February 5, 1974 (AB. 33), enquiring of the first defendant if, in view of the fact that no income was forthcoming from the said land and of the changes in the international political situation, the first defendant intended to sell the said land and if so, at what price per acre. He then received the first defendant's reply dated March 27, 1974 (AB. 35), wherein the first defendant initimated that the said land was the last piece of property left by their father, that every effort should be made to retain it, that should the opportunity present itself the said land ought to be developed to commemorate their father's toil, and, finally, that there was no intention for the time being to sell the said land as properties left by the father in Hong Kong had been sold one after another. A few months later he received the letter dated June 17, 1974 (AB. 36-39), from his engineer-friend Wong Gai Hong of Singapore (recently deceased) in reply to his letter of June 12, 1974. In this reply Wong Gai Hong expressed gladness at his intention to develop the said land and offered his professional support for its joint-venture development. Wong Gai Hong also asked him for a copy of the "site-plan of your land" to work out details with an architect-friend as to how many terraced-houses, bungalows, flats and shops could be built in accordance with the housing requirements prevailing in Kuala Lumpur. In consequence, he sent a registered letter dated July 10, 1974 (AB. 40), to the first defendant expressing his intention of carrying "building construction" himself on the said land, requesting the first defendant to send him "a photostat copy of the plan contained in the title deed" to enable an architect to prepare a sketch-plan, and telling the first defendant that if the first defendant so intended the first defendant could co-operate with him. The first defendant replied by letter dated August 6, 1974 (AB. 43), intimating that the first defendant had handed the title deeds to an architect in order that an application could be made to the authorities for the said land to be partitioned, that the first defendant would be "prepared to go into a joint venture with building contractors for development" and that he could return to assist the first defendant in developing the said land which had been left by their father. After this he received another letter from Wong Gai Hong dated August 12, 1974 (AB. 44-46), advising him that the said land, if it was registered in the name of the mother, should be transferred to him, or to both him and the first defendant, so as to avoid paying estate duty and to enable the registered owner or owners as such to execute necessary documents for the obtainment of development approval and of necessary financing. He then despatched a registered letter dated August 21, 1974 (AB. 48-49), reassuring the first defendant that when he wrote AB. 41 he was not asking the first defendant for the title deeds to the said land but only for a photostat copy of the annexed thereto so that he could study it in the context of Wong Gai Hong's ability to help in the development of the said land, reminding the first defendant that they should all in the spirit of "mutual love and mutual aid" fulfil their late father's wish for them to enjoy the property bequeathed, and expressing displeasure at the first defendant's action in submitting an application for sub-division of the said land without first discussing the matter with him. He did not receive the letter dated September 2, 1974 (AB. 53), wherein the first defendant in purported reply had stated that the said half-share had been "sold in 1968 in settlement of the debt you owed me" and that he could assist the first defendant develop the said land, if he wished to do so, for "a substantial remuneration." Hence he wrote the registered letter dated September 28, 1974 (AB. 55), with reference to AB. 48-49 asking for details

of the first defendant's application for sub-division of the said land to be furnished promptly. He then received the letter dated November 30, 1974 (AB. 61-63) wherein the first defendant explained the practical difficulties involved in having plans in respect of the development of the said land prepared by an architect in Hong Kong, requested the plaintiff to write to Wong Ngai Hon telling him to meet the first defendant, expressed views about the high cost of developing the said land in terms of both money and time and displeasure at the impression held by him "that architects here would cheat you out of the rubber estate," and intimated that because the "money market is tight and short of cash" the idea of developing the said land should be given up. The upshot of all this correspondence was the letter from the plaintiff's solicitors in Hong Kong, AB. 64, revoking the said power of attorney "with immediate effect" after which no plans to develop the said land were proceeded with by him. In November 1978 the mother passed away and the defendants came over to Hong Kong to attend the funeral but no discussion took place about the said land. In April 1979 a post-funeral tombstone ceremony was held in Hong Kong which both defendants attended and whilst he was seeing them off at the airport the first defendant asked him to return to Malaysia so that they could sell the said land which, the first defendant indicated, could easily fetch a price of $300,000/-. Apart from this passing reference at the airport no discussion took place on both these visits about the said land. In November 1979, with the distribution of the mother's monetary assets in mind, he visited Malaysia with his wife (P.W.2) and his younger son (P.W.3) to investigate the state of her monies which had been put at the disposal of the pawnshop. On the second night of this visit they called at the first defendant's house after he had telephoned earlier to say that he wanted to discuss the question of the development of the said land. The first defendant appeared after their arrival and informed him that the said land had been sold. P.W.2 enquired as to when the sale had taken place and the first defendant replied that it had taken place that very day. Thereafter P.W.2 did all the questioning. After this meeting, with the assistance of a friend named Sawyer, he proceeded to the Land Office to make enquiries and there discovered that S.E.A. had become the registered owner of the said land. He later confronted the first defendant and, ascertaining that the said land had been sold for $900,000/-, asked him to settle accounts. The first defendant responded by saying that the said land had been sold on the direction of the mother and that the proceeds of the sale would be distributed to the plaintiff's son, the first defendant's son and their only sister D.W.2, each to have a one-third share. On further enquiry, the first defendant indicated that in effecting the distribution he was willing to give the plaintiff $300,000/- amounting to one-third of the proceeds. The plaintiff replied that he wanted time to consider the matter. At the suggestion of friends, attempts were made to reach a settlement but after some time he found that the first defendant became unwilling to make payment of the one-third share. In the event he remained in Malaysia for three months and during that time sought legal advice. He returned to Hong Kong in the beginning of 1980 after leaving matters in the hands of solicitors. He eventually filed this action in August 1981.

According to P.W.2's evidence, after moving to Hong Kong with plaintiff in 1962 at the instance of her mother-in-law and the first defendant, she visited Malaysia twice. Her first visit was in 1962 when she came to retrieve her possessions left in a deposit box in the custody of the second defendant but on this occasion neither of the defendants brought up the subject of the said land for discussion. It was only during her second visit in 1979 in the company of the plaintiff and P.W.3, on the second night after their arrival when they all met in the defendant's house, that the first defendant upon the request of the plaintiff for photostat copies of the title deeds to the said land, intimated that it had been sold. She enquired as to when the sale had been effected and the first defendant replied that it had been done that very day. She then asked why she had not been told earlier and the answer was that there had been no time for the first defendant to let her know. She then responded that since they had been in the country for already a day they could surely have been informed of the sale. On a subsequent occasion at the pawnshop in answer to further enquiry, the first defendant intimated that the said land had been sold for $900,000/- and that this sum was to be divided between his son, her elder son and D.W.2 and that as far as her elder son's share was concerned, the first defendant intended to remit $100,000/- to him in England and to give the balance of $200,000/- to herself and the plaintiff. The first defendant then wrote something out on a piece of paper and requested the plaintiff to sign it but the plaintiff indicated that he wanted time to consider it. Later, at their hotel, P.W.3 after studying the document added certain words to it and when the amended docu-

ment was returned to the first defendant he refused to accept the altered text. They waited in the country for three months but to no avail as no payment was ever made by the first defendant.

P.W.3, who is a solicitor's clerk in Hong Kong, in his evidence confirmed that he accompanied the plaintiff and P.W.2 on their visit in 1979 and that on the second evening when they were in the plaintiff's house it was in response to the plaintiff's request for a photostat copy of the plans annexed to the title deed that the first defendant intimated that the said land had been sold that very day. Thereupon P.W.2 enquired as to why this communication had not been conveyed earlier and the second defendant gave the excuse that everything was done in a hurry and there was no time for communication. It was the next day at the pawnshop that the first defendant told them that the said land had been sold at the behest of the mother and that the price was $900,000/– which, the first defendant vouchsafed, would be distributed equally to Sig Mun, the first defendant's son and D.W.2. Later accompanied by Sawyer, he proceeded to the Land Office and on conducting a search discovered that there had been transactions in respect of the said land in 1968 and that S.E.A. became its registered owner in 1979 but not in November as he was given to understand by the first defendant but much earlier that year. As a result of negotiations through a third party a document, of which P.2 was a copy, was prepared with a view to a settlement to avoid dilatory court proceedings. He accordingly made amendments in the form of additions to P.2 and the amended P.2 (with the amendments in italics) reads:

"I, the undersigned, WONG MUN WAI alias WONG NGEN CHIAM (I.C. No. .....) of No. 8-B, Nassau Street, (9th Floor), Mei Foo Sun Chuen, Kowloon, Hong Kong, do hereby receive from my younger brother WONG THAM FATT of Kuala Lumpur, Malaysia, the sum of MALAYSIAN DOLLARS TWO HUNDRED THOUSAND ONLY (M$200,000/–) *being part of one third (1/3) of the sale of the rubber estate in* ... I do confirm that I have no further claims of rubber estate C.T. No. ..., Lot ....., in the Mukim of ....., in the State of Selangor, Malaysia.

I further confirm that *I will not claim* against my younger sister WONG YOCK OI of No. 203, Sai Yee Street (3rd Floor), Kowloon, Hong Kong in respect of the Estate of my mother, Madam Cheung Chun Ku alias Cheong Chun Kuk, deceased, of Kowloon, Hong Kong.

Dated at Kuala Lumpur, Malaysia this ..... day of ..... 19 ..... .

.....
(Wong Mun Wai alias Wong Ngen Chiam)

I, the undersigned, Mak Lan Yuk(f), wife of Wong Mun Wai alias Wong Ngen Chiam, of Kowloon, Hong Kong, do hereby also confirm the above.

.....
Mak Lan Yuf(f), I.C. No. .....

Witness by:–

.....
Wong Cheong Ting, I.C. No. .....

.....
Advocate & Solicitor
Kuala Lumpur."

It was agreed that the first defendant would give the plaintiff $200,000/– and Sig Mun $100,000/– but no payment was ever made resulting in this action being filed in August 1981. The delay in filing the action was due to the negotiations that were being undertaken by the plaintiff's solicitors with the defendants.

P.W.5, a partner and good friend of the first defendant who became the temporary registered owner of the said half-share on April 20, 1968, stated in evidence that when he bought the said half-share from the first defendant he knew that it belonged to the plaintiff. He also knew that the plaintiff owed the first defendant money and that the price of $3,000/– he paid for the said half-share was half its market value. He transferred it to the second defendant on May 3, 1983, because he wanted to allow her to buy back "inheritance property derived from the mother" and was also making a profit of $500/– in the process.

The plaintiff's case in a nutshell therefore is that through the collusion of the defendants the plaintiff was deprived of the said half-share in 1968 and was misled into believing that he was still the owner of the said half-share until 1979. It is clear that the plaintiff's case revolves round three central facts – the the plaintiff executed the authorisation-cum-undertaking in 1966 in spite of the existence of the said power of attorney he gave to the first defendant in 1962, that there was the transfer of the said half-share by the first defendant to P.W.5 and its almost immediate re-transfer (within 13 days) into the household of the first defendant via the second defendant, and that no mention was made in any of the letters received by the plaintiff from the first defendant that the said half-share had actually been sold.

We shall now consider the evidence in rebut-

tal which in the main is found in the testimony of the first defendant.

The first defendant who is sixty-six years old and English-speaking gave his version in Cantonese as follows. Although the mother transferred the said land to himself and the plaintiff in 1954 in equal shares when she decided to leave for Hong Kong to settle down there, her original intention was in fact to convey the whole of the said land to him but it was only at his instance that the plaintiff was made the other half-owner. In 1962 when he was the general manager of the pawnshop, the plaintiff, who was merely a manager working under him, resigned from his position because of complaints from the partners of the pawnshop who were dissatisfied with the plaintiff's performance in starting work late at 9.00 a.m. and finishing early at 12.00 noon when the normal hours of work were from 8.00 a.m. to 5.00 p.m. As the plaintiff was out of a job the plaintiff decided to leave for Hong Kong to assist the mother to redevelop her landed properties there but before the plaintiff left there was a discussion between himself and the plaintiff with regard to the maintenance of Sig Mun in Australia. He agreed to keep sending monthly remittances for Sig Mun's maintenance on behalf of the plaintiff who had suggested that he sell the plaintiff's two remaining landed assets in order to settle any debts owing to him. The plaintiff executed the power of attorney in his favour to enable him to look after all the plaintiff's interests. He began to remit the monthly allowance of A£45 per month to Sig Mun from September 1962 until early 1966. In 1964 he sold the Raub property after informing the plaintiff by AB. 10 in May 1964 of the intended sale and asking how the proceeds of the sale were to be utilized. He had sold it at $23,500/– when he received no instructions from the plaintiff. He, however, kept an account of all monies realised in respect of rentals and the sale of the Raub land and submitted accounts to the plaintiff. When he received no instructions from the plaintiff in respect of his subsequent letter AB. 12 sent nine days later as to how he was to deal with the proceeds of sale, he placed them in the pawnshop to earn interest. However, on July 6, 1964, he remitted HK$5,000/–, equivalent to M$2,693.75, to the plaintiff as requested and continued with the remittances to Sig Mun. Then on October 19, 1964, the plaintiff wrote asking for a further HK$10,000/– and he sent the equivalent sum of M$5,381.46. When there was only a balance of M$1,068.98 left to cover remittances only for 3 months he wrote AB. 13 and D.1 (SAB. 65) was the plaintiff's reply expressing concern at the meagre balance left for his son's upkeep and appealing to the first defendant to continue sending the allowances by making personal advances for which the plaintiff expressed preparedness to pay interest. He did not reply to this letter as he was intending to visit the mother in May of that year. He made this intended visit and met the plaintiff who indicated his desire to dispose of the said half-share and accordingly reduced it in writing in the form of the said certificate which had been drafted by the plaintiff himself. On his return from Hong Kong he looked for buyers for the said half-share but to no avail. He, however, continued remitting money to Sig Mun until June 1967 when he was told by Sig Mun that he was due to qualify and therefore required no more remittances. He did not communicate this information to the plaintiff. However, in September 1967, he received AB. 20 from the plaintiff requesting him to send £70 sterling to Sig Mun but he did not do so because he decided that he had already sent "so many remittances" and that, in any event, Sig Mun "had qualified." So he wrote as he did in AB.24 but before this he had already sent AB.21 and the statement of account AB.22 where the sum shown to be owing to him by the plaintiff was $6,016.27. After sending AB.24 he also sent AB.27 accompanied by AB.28 but he received no correspondence from the plaintiff for more than five and a half years until AB. 31 arrived. He did, however, meet the plaintiff when he was in Hong Kong from April 27 to May 22, 1969, and, on an occasion after he had had dinner with the plaintiff and the mother, he informed them that he had originally sold the said half-share to P.W.5 but re-purchased it on receiving the mother's letter AB.26 which was a reply to his letter written towards the end of March 1968 informing the mother that he had sold the said half-share to P.W.5 for $3,000/–. At this meeting the mother approved of what he had done but the plaintiff said nothing. He also reminded the plaintiff of the plaintiff's debt to him but the plaintiff offered no suggestion as to how this indebtedness was to be resolved. He knew that he had sold the said half-share to P.W.5 at half its market value and it was after he had shown AB.26 to the second defendant and her reaction disapproving this sale to P.W.5 in the light of what the mother had said that he and the second defendant approached P.W.5 to sell the said half-share back to them. P.W.5 very reluctantly agreed to do so at the price of $3,500/– which was paid in cash by the second defendant from her savings. It was eleven years later that the said land was sold to S.E.A. The letter AB. 31 from the plaintiff (which made no

reference to the said half-share or the said land) was in effect a request enlisting his assistance to obtain early release of money to the plaintiff to enable the plaintiff to buy a flat of his own and in response he did speak to the mother on the plaintiff's behalf. A year later he received AB. 33 from the plaintiff enquiring if he had any intention to sell the said land as it brought in no income and as the international political situation was unpredictable but he could not fathom the plaintiff's actual intention in writing this letter. He then replied in AB.35 to say that the said land was the last remaining piece of property left by their father and that they should not sell it. When he received AB. 40 from the plaintiff requesting for a photostat copy of plans and intimating that the plaintiff had decided to carry out building construction himself and inviting him to co-operate with the plaintiff, he replied by AB. 43 telling the plaintiff that since the said land was in Malaysia the plaintiff could return to Malaysia to assist him in developing "the property left" by their father as he considered that the said land should be retained and developed by themselves so that the profits thereby derived could be distributed amongst all members of the family even though the said land was then actually registered in his name and that of the second defendant. The next letter he received was AB.48 which upset him as he thought the plaintiff was just trying to find fault with him and he accordingly responded with AB.53 rejecting plaintiff's claim to the said land. He received the two letters AB.55 and AB.57 and replied by AB.61 in which he took pains to explain the practical difficulties and high cost involved in development out of respect for the plaintiff as his elder brother and also for the reason that he wanted to allay any suspicion the plaintiff might have of being cheated. He received no response from the plaintiff except for the solicitor's letter AB.64. Four years later when the mother passed away in November 1978 he met the plaintiff in Hong Kong but they had no discussion over the said land. In the same month, but after the mother's death, he commenced negotiations with S.E.A. to sell the said land. The whole transaction relating to the sale and transfer was completed on March 15, 1979. When he met the plaintiff and P.W.2 in November 1979 he told them of the sale and the plaintiff asked for $450,000/– as his share as half-owner of the said land. He rejected this claim but instead offered to pay the plaintiff $200,000/– merely out of deference to the plaintiff as his elder brother and also to prevent the plaintiff from harassing their sister D.W.2 with the demand to transfer the ownership of her flat to P.W.3. This offer was made in the presence of Wong Chung Ting, deceased, who was actually the person who had drafted the terms of the undertaking in P.2, a copy of which was given both to him and the plaintiff. The plaintiff refused to accept the sum of $200,000/– as he was insistent upon getting $450,000/– as his share. Of the proceeds of the sale of the said land to S.E.A., he gave D.W.2 $220,000/– but has not distributed to the other members of the family including the widow of his step-brother and his step-sister because of the action.

The first defendant has therefore denied having conspired with the second defendant or having used P.W.5 to defraud the plaintiff of the said half-share.

D.W.2, who at 64 years old, ranks in age in between the plaintiff and the first defendant, testified that she settled down in Hong Kong in the early part of 1950. The elder daughter of the first defendant was brought over by the mother to stay with her later, some time in 1954 or 1955 and all the three of them lived together in the same flat. Then in 1962 the plaintiff arrived with P.W.2 and their two children and they too lived in the same flat until 1972 when they moved out after the mother had given the plaintiff HK$150,000/–. In 1969 when the first defendant visited them he informed them when she, the plaintiff and the mother were all gathered together, that the said land had originally been sold to a friend but that as a result of the letter from the mother the second defendant "had bought the estate back from the friend." None of them reacted verbally to the news of this transaction. Although during the period when they all stayed together the plaintiff and P.W.2 did not have a cordial relationship with the mother she herself had a cordial relationship with them. When the mother sold a block of flats in 1972 the mother gave the plaintiff HK$150,000/–, the first defendant's son HK$100,000/– and the widow of her step-brother HK$100,000/–. It was after accepting this monetary gift that the plaintiff and his family moved out to stay on their own. A year or two later the mother bought a third-floor flat which was registered both in her name and that of the first defendant's daughter and it was there that the mother stayed with the two of them until her death in 1978. Then in 1979 the plaintiff approached her and requested her to transfer a half-share in the ownership of the flat to his son P.W.3 on the ground that the flat having been bought by the mother a half-share should rightfully be given to P.W.3 but she refused without, however, revealing

to the plaintiff the fact that she was merely half-owner of the flat. After this incident she has not been on speaking terms with the plaintiff and has kept away from his family. She is aware that the said land was family property and that it was her mother's wish that it was to remain within the family. In 1980 when she visited Malaysia the first defendant informed her that the said land had been sold for $900,000/– and gave her a sum equivalent to HK$500,000/– because Chinese tradition prescribed that she, as an unmarried daughter, was entitled to a share in "inherited property."

The second defendant testified that she did not know of the sale of the half-share to P.W.5 in April 1968 until she "happened to come across" AB.26 which she construed to indicate that the mother wished "to buy back the property." She then together with the first defendant approached P.W.5 for its repurchase by them. P.W.5 demurred and informed them that he wanted time to think. A few days later they went to see him again and on this occasion he agreed to sell it at $3,500/–. For the re-purchase she provided the cash from her personal savings which the first defendant did not know she had. In 1975 when the mother visited Malaysia she recalled the mother telling the first defendant that he could sell the said land at a good price since it was not yielding any income and accordingly it was sold for about $900,000/– in 1979 after the mother's death. In 1979 when the plaintiff visited Malaysia as part of his tour of Thailand he understood from the first defendant that the plaintiff had asked for the sum of M$450,000/– but the first defendant rejected the requested as he was only prepared to give the plaintiff M$200,000/–, an amount the plaintiff refused to accept.

D.W.4, a mutual friend of both the plaintiff and the first defendant, who happened to be holidaying in Hong Kong when he witnessed the execution of the authorisation-cum-undertaking in his hotel room, stated in evidence that he attested it as a witness at the specific request of the plaintiff who had informed him that it had to be signed by both of them because the plaintiff wanted to ensure that remittances would continue to be sent to his son. He failed, however, to understand the significance of the last sentence in the document. He only signed as a witness to an arrangement between the plaintiff and the defendant and had no knowledge as to who had actually prepared the document. As a partner of the pawnshop he could not agree with the first defendant's allegation that the partners were dissatisfied with the plaintiff's performance as an employee in the pawnshop before leaving for Hong Kong.

As the first two issues are interrelated I shall deal with them together.

Despite the existence of the will of the mother dated July 18, 1947, D.2, which was never probated, expressing her original intent in giving only the first defendant and D.W.2 the said land as part of her residuary estate, the certificate of title, AB. 66, clearly affords proof of the plaintiff's indefeasible title at the relevant time to the said half-share when the mother clearly changed her mind and transferred the said land to both of them on December 14, 1954. I have no difficulty, having regard to the agreed facts and the totality of the evidence elicited, in accepting the statement of the plaintiff, whom I found to be a more forthright witness than the first defendant, that when he left for Hong Kong he did so under a family arrangement whereby it was agreed between himself and the first defendant that he was to go to Hong Kong to manage the family properties there whilst the first defendant was in consequence to manage his personal affairs locally and that it was pursuant to this arrangement that the power of attorney was executed. In the light of these facts I do not think it can be disputed that the first defendant was entrusted in 1962 to manage the plaintiff's properties in Malaysia so that he must be deemed to be the trustee of the plaintiff in respect of the said half-share. In any event he was, in my view, without question the plaintiff's agent, albeit a gratuitous one. In this regard *Bowstead* on Agency, Fourteenth Edition (1976), at page 122, states:

> "(1) A gratuitous agent will be liable to his principal if in carrying out the work he fails to exercise the required degree of skill and care.
>
> (2) The degree of care and skill owed by a gratuitous agent to his principal is such skill and care persons ordinarily exercised in their own affairs ..."

and at page 125:

> "Every agent owes his principal fiduciary duties (duties of loyalty)."

I do not think it is necessary for the purposes of this case to enter into a discussion as to the distinction between the fiduciary duties owed by a trustee to the *cestui que* trust and those owed by an agent to his principal. Suffice it to say, (in the words of *Bowstead* at page 127) "that the principal-agency relationship is by its inherent nature a fiduciary

relationship. By reason of the relationship, certain duties are owed by the agent to the principal; those duties are the fiduciary duties. What particular duties may be owed in any given situation will depend upon the nature of the situation in question." There can be no question therefore that in this particular case the first defendant had a duty to act in good faith in protecting the interests of the plaintiff with regard to the said half-share and could not use his position as agent to profit at the plaintiff's expense.

Having disposed of the first two issues I now come to the third issue. After the first defendant had sent AB. 13 and the statement of account AB. 14, it is evident that the plaintiff entertained some concern and wrote D.1 asking the first defendant if he could continue sending the remittances to Sig Mun from the first defendant's own pocket. It is also evident that when there was the exchange of correspondence between the first defendant and the plaintiff in the form of AB. 13 and D.1 the funds belonging to the plaintiff in the hands of the first defendant were running low so that the first defendant must have been very anxious as to how he was going to continue maintaining his nephew Sig Mun after the small reserve sufficient to cover remittances for three months was exhausted. I think, in the circumstances, it was quite natural for him to obtain a further assurance from the plaintiff to dispose of his remaining assets in Malaysia. It is the contention of the plaintiff that the procurement by the first defendant of the authorisation-cum-undertaking specifically mandating the first defendant to sell at any price is indicative of the intention on the part of the first defendant to undersell the said half-share pursuant to a well-conceived plan by both the defendants to deprive the plaintiff of the said half-share. After seeing the witnesses on the stand and considering their evidence fully, I am satisfied in all probability that the two sales, firstly to D.W.3, and, secondly to the second defendant, were simulated transactions motivated by a mistaken belief that these separate transfers would obviate suspicion against the first defendant of any wrong-doing. However I am far from satisfied that these purported transfers taken together with the execution of the authorisation-cum-undertaking compel the conclusion or inference that there was fraudulent conspiracy on the part of the husband and wife to rid the plaintiff of the said half-share. I accept the plaintiff's statement that he did not receive AB. 21 and AB. 22 showing that the plaintiff owed $6,016.27 nor AB. 27 and AB. 28 showing that although the said half-share had been sold the plaintiff was still owing $3,006.27. I also accept the plaintiff's statement that he did not receive AB. 53 intimating in no uncertain terms that the said half-share had been "sold in 1968 in settlement of the debt you owed me" because there would otherwise have been no reason for him, three weeks after AB. 53 was purported to have been written, to have sent AB. 55, the tone of which indicates that the plaintiff was clearly labouring under the impression that he still had a proprietary interest in the said land. I accept the plaintiff's denial that he was informed of the sale of the said half-share at a family meeting in 1969 when the first defendant visited Hong Kong and I do not believe D.W.2's evidence to the contrary as, in this family dispute, it is clear, by virtue of her close association with the defendant's daughter and her acceptance of the sum of HK$500,000/– from the first defendant, that her sympathy and partiality would naturally incline towards the defendant in this action. I believe the evidence of the plaintiff, P.W.2 and P.W.3 that they only came to know of the sale of the said land in November 1979 and that discovery of the transactions affecting P.W.5 and the second defendant was made only after the search conducted at the Land Office pursuant to the disclosure by the defendants. I am satisfied that when the first defendant caused the said half-share to be transferred out of the plaintiff's ownership he did not do so with fraudulent intent as he was legally empowered to do so not only by the power of attorney but specifically by the authorisation-cum-undertaking. However, his conduct, in my view, was far from honourable and fell far short of that required of an agent although it was obviously, to a very large extent, the result of his pre-occupation with the plaintiff's indigence and consequent financial dependence upon him. The evidence also clearly indicates that the plaintiff and P.W.3 were also something of a nuisance to the mother because of the plaintiff's impecunious circumstances and perpetual need for financial assistance. Having regard to the fact that we are dealing with a traditional Chinese family, I think it probable that the first defendant wanted to avoid an embarrassing confrontation with an elder brother and consequently refrained from informing the plaintiff straightforwardly that the said half-share had been sold to the second defendant. Even if I accept the plaintiff's evidence that he had a one-third interest in Sang Wood, which had changed ownership for a consideration of M$17,000/– in 1963, it is, in my view, unreasonable for the plaintiff to think that he had an inexhaustible supply of funds from his share of the proceeds of the sale to maintain Sig

Mun. He must have known that at some point of time the said half-share would be sold to extinguish his mounting personal debt to the first defendant. Having regard to the totality of the evidence adduced, I hold, on the authority of *Lau Hee Teah's* case *(supra)* with regard to the standard of proof, that the plaintiff has failed to discharge the burden of proof required of him to establish that the first and second defendants had by misrepresentation and/or fraud caused the said half-share to be transferred to the second defendant. Nevertheless, in view of my finding that the first defendant was the agent of and owed fiduciary duties to the plaintiff, the first defendant has certainly, to my mind, failed in his duty as agent of the plaintiff in selling the said half-share well below the market value and also in not informing the plaintiff that he had sold it at $3,500/– in 1968 to the second defendant below its market value so as to afford the plaintiff the opportunity of questioning the price especially in view of its transfer to their mutual friend, P.W.5, at $3,000/– and its subsequent transfer to the second defendant, a circumstance which would certainly have put the plaintiff on guard as to the adequacy of the purchase price of $3,000/–. I am more than satisfied that the plaintiff only came to know of the transfer to P.W.5 and the re-transfer ostensibly to the second defendant only after the family meeting at the defendants' house in November 1979, and as such I cannot see how the plaintiff can be said to be estopped or precluded by his conduct, from bringing this action.

As to the fourth issue, since the action was filed on August 27, 1981, well within twelve years of the discovery of the transactions affecting P.W.5 and the second defendant, the action, in my opinion, is not barred by either section 9 or section 22 of the Limitation Act 1953.

I come finally to the question of the moneys that are due to the plaintiff. The Chartered Valuer (P.W.4) gave evidence that the open market value of a half-undivided share of the said land in April and May 1968 was $9,100/–. In my view, it would not be appropriate in the circumstances of this case to import the comparatively recent practice of valuing real property by registered professional experts to a period when valuations were done by rather rough and ready methods prevailing at that time. I would accordingly accept the evidence of P.W.5, who was a broker in real property at the material time, and that of the first defendant that the market value of the said half-share when P.W.5 bought it from the first defendant was $6,000/–. In that event, the first defendant who sold the said half-share for the stated price of $3,000/– in fact undersold it by fifty per cent. In the circumstances the first defendant, in my judgment, has to account to the plaintiff for this short-fall after setting off what was stated by the defendant to be owing to him by the plaintiff in the region of $3,000/–. It is an agreed fact that the said land was actually sold by the first defendant to S.E.A. for $962,062.50 so that by a process of simple arithmetic the first defendant must pay the plaintiff the sum of (to make it a round figure) $240,500/–. As the sale to S.E.A. took place some time in March 1979 and the transfer registered on May 30, 1979, when it can be assumed that the whole purchase price would have been paid to the first defendant, I give judgment in the sum of $240,500/– with interest to run on this sum from June 1, 1979 at the rate of 8% per annum until the date of judgment. The plaintiff is entitled to his costs against the first defendant.

Order accordingly.

Solicitors: *Ng Ek Teong & Partners; T. Selvarasan & Co.*

PUBLIC PROSECUTOR v. MUDA BIN MOHAMED & ANOR.

[O.Cr.J. (Abdul Malek J.) November 23, 1986]

[Kota Bahru – Criminal Trial No. 2 of 1984]

Criminal Law and Procedure – Amendments to Dangerous Drugs 1952 making death sentence mandatory – Whether applicable to cases pending hearing in the Sessions Court before amendment came into force – Vested right of accused for case to be continued in Sessions Court – Dangerous Drugs Act 1952, ss. 39B, 41 & 41A.

Criminal Law and Procedure – Trial – Forum of – Trial partially heard in Sessions Court – Requisition by prosecution for case to be tried in High Court – Illegal and void.

Dangerous Drugs – Amendments to Dangerous Drugs Act 1952 making death sentence mandatory – Effect on cases pending hearing in Sessions Court before amendments came into force.

Jurisdiction – Sessions Court – Partially heard case in Sessions Court – Order of transmission to High Court illegal and void.

Both the accused in this case had been charged with trafficking in a dangerous drug *i.e.* 234 gms. of cannabis in the Sessions Court on December 12, 1982. At that point of